WEE CHOO KEONG

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, SHAH ALAM
WAN YAHYA J
[REVISION APPEAL NO. 43-4-90]
19 JANUARY 1990

LEGAL PROFESSION: *Rule 28 of the Legal Profession (Practice and Etiquette) Rules 1978 - Whether rule of ethics must be applied with the stringency of the force of law - Circumstances where advocate and solicitor cannot act when it is apparent that he has to be a witness in the proceedings.*

The petitioner is an advocate and solicitor and had been retained to act on behalf of the family, of a deceased who died whilst in police custody. At the inquest held by the Magistrate the Prosecution Officer took objection to the petitioner's presence in Court, as Counsel holding a watching brief on behalf of the family of the deceased as his statement had been recorded by the police and he would be called as a witness in the case. Further, there was an allegation that the petitioner was the one who wrote a police report lodged by the deceased's son.

The petitioner stated that he had no knowledge about the case until he was retained by the family and on the day of the death he was away in Japan.

The Magistrate upheld the objection and ruled that pursuant to r. 28 of the Legal Profession (Practice and Etiquette) Rules 1978 ("Rule 28") the petitioner could not represent the deceased's family.

The petitioner wrote to the Judge whereupon this hearing was held.

Held:

[1] Section 255 of the Criminal Procedure Code and Article 5(2) of the Federal Constitution are not applicable in this case as both provisions speak of the accused persons to be defended, and not of Counsel's appearance at inquests.

[2] Rule 28 of the Legal Profession (Practice and Etiquitte) Rule 1978 does not envisage that an advocate and solicitor is *ipso facto* excluded from appearing as such in Court, the moment he believes that he will be a witness. The ethical restrictions will only arise if he is likely to be a witness of any material or disputed fact.

[3] Rule 28 is a rule of ethics and the Magistrate should not have applied it totally with the stringency of the force of law.

[4] The only matter which appears to be in conflict with the petitioner's presence is the allegation that he and not the deceased's son wrote the report.

[5] The petitioner shall only be excluded to that stage of the proceeding if and when the deceased's son is about to give evidence.

[Order accordingly.]

Legislation referred to:
Criminal Procedure Code, s. 255
Federal Constitution, art. 5(2)
Legal Profession Act 1976, s. 28
Legal Profession (Practice and Etiquette) Rules 1978, r. 28

For the applicant - Wee Choo Keong; M/s. Wee Choo Keong & Faaiz Peguambela & Peguamcara
For the respondent - Ibrahim bin Taib

JUDGMENT

Wan Yahya Pawah Teh J:

In consequence to a letter received from the petitioner, herein I have called for this hearing. The petitioner according to his own letter, is the Counsel retained by the family of a deceased detainee who died whilst in police custody.

At the subsequent inquest held at the Magistrate Court Klang, the Prosecution Officer took objection to the petitioner's presence in Court as Counsel on a watching brief on the ground that his statement had been recorded by the police and that he would be called as a witness in that case.

The learned Magistrate upheld the Prosecution Officer's objection and ruled that in accordance with s. 28 of Legal Profession Act, the petitioner could not represent the deceased family.

Counsel is unhappy about the order because as had been disclosed to the learned Magistrate as well as in his statement to the police, he had no knowledge about the case until retained by the deceased's family on 24 June 1989. According to him, on the day the death occurred he was away in Japan. There was therefore no conflict of interest to warrant s. 28 to be applied against him.

In reply the Prosecution Officer said he was unable to state to what extent the petitioner was involved in the case other than that some witnesses had alleged that the petitioner was with the deceased's son at the time he lodged a police report and that the petitioner himself had written the report on behalf of the deceased's son.

At a first glance it would seem that the issue does involve Article 5(2) of the Federal Constitution and s. 255 of Criminal Procedure Code and r. 28 of the Legal Profession (Practice and Etiquette) Rules 1978 and not the Act as cited by both the learned Magistrate and Counsel's application.

The rights under Article 5(2) of the Federal Constitution and s. 255 of the Criminal Procedure Code appear to be inapplicable here as both provisions of the law speak of accused persons to be defended and not of Counsel's appearance at an inquest.

Rule 28 explained as "advocate and solicitor not to appear in a case where he is a witness' reads:

> (a) An advocate and solicitor shall not appear in Court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interest.

This section to my mind does not envisage that an advocate and solicitor is *ipso facto* excluded from appearing as such in Court, the moment he believes that he will be a witness. That ethical restriction will only arise if he is likely to be a witness of any material or disputed fact.

Rule 28 is a rule of ethics and the Magistrate should not have applied it totally with the stringency of the force of law.

In case like this the rule of common sense and fair play in keeping with our tradition of maintaining a fair and impartial adverserial system should be observed.

The only matter which appears to be in conflict with the petitioner's presence is the allegation that he and not the witness wrote the report.

The problem could be fairly solved by confining the order of the learned Magistrate on the exclusion of Counsel only to that stage of the proceeding if and when the deceased's son is about to give evidence and it is hereby so ordered.

Also found at [1990] 1 CLJ 1015